

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JORGE ENRIQUE MURILLO,
CDCR #T-16641,

Plaintiff,

vs.
D.K. McBRIDE; MS. RONQUILLO;
N. CATALUNA; V. KEMP; BLUEFORD;
C. SALANG; LT. D. ARGUILEZ;
E. GARCIA; MS. CLARK; R. COBB,

Defendants.

Civil No. 11-cv-1560-BAS(KSC)

**ORDER GRANTING DEFENDANTS'
MOTION FOR ORDER REQUIRING
PLAINTIFF TO PAY FULL CIVIL
FILING FEE AND REVOKING
ORDER GRANTING PLAINTIFF
LEAVE TO PROCEED *IN FORMA
PAUPERIS* PURSUANT TO
28 U.S.C. § 1915(g)**

[ECF No. 50]

I.
PROCEDURAL HISTORY

On July 11, 2011, while incarcerated at Corcoran State Prison located in Corcoran, California, Plaintiff, proceeding pro se, filed this civil rights action pursuant to 42 U.S.C. § 1983 regarding conditions of his confinement when he was incarcerated at the Richard J. Donovan Correctional Facility in 2010. (See Compl., ECF No. 1, at 1.) In addition, Plaintiff filed two Motions to Proceed *In Forma Pauperis* ("IFP"). (ECF Nos. 2, 6.)

On October 28, 2011, the Court granted Plaintiff's Motion to Proceed IFP and directed service of the Plaintiff's Complaint on the named Defendants. (ECF No. 9.) Defendants have

1 now filed a “Motion for Order Revoking Plaintiff’s *In Forma Pauperis* Status, Declaring
 2 Plaintiff a Three-Strikes Litigant, and Dismissing the Complaint.” (ECF No. 50.) Plaintiff has
 3 filed an Opposition to which Defendants have filed a Reply. (ECF Nos. 55, 58.)

4 **II. DEFENDANTS’ MOTION**

5 In this Motion, Defendants seek revocation of Plaintiff’s IFP status, as well as dismissal
 6 of this action for failing to pay the initial civil filing fee. (See Defs.’ Memo of Ps & As [ECF
 7 No. 50-1] at 5.) Defendants also request judicial notice of previous civil filings by Plaintiff.
 8 (See Defs. Req. for Judicial Notice [ECF No. 50-3] at 1.) A court ““may take notice of
 9 proceedings in other courts, both within and without the federal judicial system, if those
 10 proceedings have a direct relation to matters at issue.”” *Bias v. Moynihan*, 508 F.3d 1212, 1225
 11 (9th Cir. 2007) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir. 2002)). In
 12 this case, the Court finds it is appropriate to take judicial notice of the documents attached to
 13 Defendants’ Notice.

14 Defendants argue that Plaintiff is not entitled to IFP status in this matter based on his
 15 previous litigation history. See 28 U.S.C. § 1915(g). In addition, Defendants argue that
 16 Plaintiff’s “complaint did not allege that he was under imminent danger of serious physical
 17 injury” at the time he filed this action. (Defs.’ Memo of Ps & As at 5; citing *Andrews v.
 18 Cervantes*, 493 F.3d 1047, 1051-52 (9th Cir. 2007) (hereafter “*Cervantes*”) (noting § 1915(g)’s
 19 exception for IFP complaints which “make[] a plausible allegation that the prisoner faced
 20 ‘imminent danger of serious physical injury’ at the time of filing.”)).

21 **A. Standard**

22 Section 1915 of Title 28 of the United States Code allows certain litigants to pursue civil
 23 litigation IFP, that is, without the full prepayment of fees or costs. 28 U.S.C. § 1915(a)(2).
 24 However, the Prison Litigation Reform Act (“PLRA”) amended section 1915 to preclude the
 25 privilege to proceed IFP:

26 . . . if the prisoner has, on 3 or more prior occasions, while
 27 incarcerated or detained in any facility, brought an action or appeal
 28 in a court of the United States that was dismissed on the grounds
 that it is frivolous, malicious, or fails to state a claim upon which
 relief can be granted, unless the prisoner is under imminent danger
 of serious physical injury.

2 28 U.S.C. § 1915(g). “This subdivision is commonly known as the ‘three strikes’ provision.”
3 *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005) (hereafter “*Andrews*”). “Pursuant to
4 § 1915(g), a prisoner with three strikes or more cannot proceed IFP.” *Id.*; *see also* *Andrews v.*
5 *Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007) (hereafter “*Cervantes*”) (under the PLRA,
6 “[p]risoners who have repeatedly brought unsuccessful suits may entirely be barred from IFP
7 status under the three strikes rule[.]”). The objective of the PLRA is to further “the
8 congressional goal of reducing frivolous prisoner litigation in federal court.” *Tierney v. Kupers*,
9 128 F.3d 1310, 1312 (9th Cir. 1997).

10 “Strikes are prior cases or appeals, brought while the plaintiff was a prisoner, which were
11 dismissed on the ground that they were frivolous, malicious, or failed to state a claim,”
12 *Andrews*, 398 F.3d at 1116 n.1 (internal quotations omitted), “even if the district court styles
13 such dismissal as a denial of the prisoner’s application to file the action without prepayment of
14 the full filing fee.” *O’Neal v. Price*, 531 F.3d 1146, 1153 (9th Cir. 2008). Once a prisoner has
15 accumulated three strikes, he is prohibited by section 1915(g) from pursuing any other IFP action
16 in federal court unless he can show he is facing “imminent danger of serious physical injury.”
17 See 28 U.S.C. § 1915(g).

B. Application of 28 U.S.C. § 1915(g)

19 Defendants set forth two district court cases and one appellate matter, filed by Plaintiff,
20 which they argue constitute “strikes” under 28 U.S.C. § 1915(g).¹ These matters are as follows:

21 1. *Murillo v. Le Beau*, C.D. Cal. Civil Case No. 2:05-cv-07280R-RNB (Order
22 Adopting Findings, Conclusions and Recommendations of United States
23 Magistrate Judge dismissing Complaint for failing to state a claim dated
24 Nov. 7, 2005);

27 ¹ Defendants also submit a case filed by Plaintiff in 2012 which was dismissed for failing to state
28 a claim. However, Defendants “acknowledge the [dismissal] does not apply for the basis of the determination of this matter.” (Defs. Memo of Ps & As at 4, fn.1.) This matter clearly does not apply to the motion before this Court and was not considered by the Court.

1 2. *Murillo v. Inserra*, AZ Civil Case No. 2:05-cv-01713-EHC-VAM (Order
 2 Dismissing Complaint for failing to state a claim dated Jan. 11, 2006); and
 3. *Murillo v. Inserra*, 9th Cir. Court of Appeal Doc. No. 06-15256 (Order
 4 dismissing appeal for failing to prosecute following failure to pay filing fee
 5 after denial of Motion to Proceed *In Forma Pauperis* dated July 13, 2006).

6 The first two actions are clearly “strikes” within the meaning of 1915(g) as both of these
 7 actions were dismissed for failing to state a claim. The third proposed “strike” set forth by
 8 Defendants is an appeal brought by Plaintiff of the case that forms the basis of his second
 9 “strike.” Section 1915(g) defines a “strike” as an “action or appeal in a court of the United
 10 States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim
 11 upon which relief may be granted.” 28 U.S.C. § 1915(g). Defendants argue that this appeal was
 12 frivolous because the Ninth Circuit denied Plaintiff the right to proceed IFP on appeal by finding
 13 that the appeal was not taken in good faith. (See Defs. Memo of Ps & As at 4.) Plaintiff argues
 14 that this appeal cannot constitute a “strike” because the appeal was dismissed for failing to
 15 prosecute. (See Pl.’s Opp’n at 5.)

16 The Court has reviewed the docket in this appeal. On March 10, 2006, the district court
 17 in the underlying matter determined that the appeal was not filed in good faith pursuant to 28
 18 U.S.C. § 1915(a)(3). (See *Murillo v. Inserra*, 9th Cir. Court of Appeal Doc. No. 06-15256 , ECF
 19 No. 8.) “The good faith requirement is satisfied if the petitioner seeks review of any issue that
 20 is not frivolous.” *Gardner v. Pogue*, 558 F.2d 548, 550-51 (9th Cir. 1977) (citing *Coppedge v.*
 21 *United States*, 369 U.S. 438, 445 (1962)). The appellate court has the authority to find that the
 22 district court erred in finding that an appeal was not taken in good faith. *See O’Neal*, 531 F.3d
 23 at 1150. In the matter before this Court, a review of the appellate docket shows that the Ninth
 24 Circuit agreed that Plaintiff’s appeal was not taken in good faith and therefore, Plaintiff’s appeal
 25 was frivolous. The Ninth Circuit denied Plaintiff’s motion to proceed IFP on appeal and
 26 informed him that he must pay the filing fee or the matter would be dismissed for failing to
 27 prosecute. (See *Murillo v. Inserra*, 9th Cir. Court of Appeal Doc. No. 06-15256 , ECF No. 18.)
 28

1 Plaintiff failed to pay the filing fee within the time prescribed and the case was dismissed for
 2 failing to prosecute. (*Id.*, ECF No. 18.)

3 The Ninth Circuit has held that “strikes” pursuant to § 1915(g) are “prior cases or
 4 *appeals*, brought while the plaintiff was a prisoner, which were dismissed ‘on the ground that
 5 [they were] frivolous, malicious, or fail[] to state a claim.’ *Lira v. Herrera*, 427 F.3d 1164, 1170
 6 n. 7 (9th Cir. 2005) (emphasis added). Here, Plaintiff’s appeal was dismissed because the Ninth
 7 Circuit denied his IFP on the grounds that his appeal was frivolous. *See Knapp v. Hogan*, 738
 8 F.3d 1106, 1110 (9th Cir. 2013) (When an appeals court relies on a district court’s finding that
 9 an appeal is “not taken in good faith,” the “lack of ‘good faith’ in this context has been held to
 10 be equivalent to a finding of frivolity.”) (citation omitted.) Accordingly, this Court finds that
 11 this matter constitutes Plaintiff’s third “strike.”

12 **B. Imminent danger of serious physical injury**

13 There is an exception to the three strikes bar of § 1915(g) if there is a “plausible
 14 allegation” to suggest Plaintiff “faced ‘imminent danger of serious physical injury’ at the time
 15 of filing.” *Cervantes*, 493 F.3d at 1055 (quoting 28 U.S.C. § 1915(g)). However, at the time
 16 Plaintiff filed this Complaint regarding incidents at RJD, he was housed in a different prison.
 17 Moreover, there are no claims in Plaintiff’s Complaint that he faced “imminent danger of
 18 serious physical injury” while housed at Corcoran relating to the claims in this action.

19 Accordingly, because Plaintiff has, while incarcerated, accumulated three “strikes”
 20 pursuant to § 1915(g), and he fails to make a “plausible allegation” that he faced imminent
 21 danger of serious physical injury at the time he filed his Complaint, he is not entitled to the
 22 privilege of proceeding IFP in this action. *See Cervantes*, 493 F.3d at 1055; *Rodriguez*, 169 F.3d
 23 at 1180 (finding that 28 U.S.C. § 1915(g) “does not prevent all prisoners from accessing the
 24 courts; it only precludes prisoners with a history of abusing the legal system from continuing to
 25 abuse it while enjoying IFP status”); *see also Franklin v. Murphy*, 745 F.2d 1221, 1231 (9th Cir.
 26 1984) (“[C]ourt permission to proceed IFP is itself a matter of privilege and not right.”).

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1 **III. CONCLUSION AND ORDER**

2 Accordingly, IT IS HEREBY ORDERED that:

3 1) Defendants' Motion to Revoke Plaintiff's IFP status under the "Three Strikes"
4 provision of 28 U.S.C. § 1915(g) is **GRANTED**.

5 2) Plaintiff must pay \$350 filing fee in full within thirty (30) days from the date this
6 Order is Filed. If Plaintiff fails to pay the filing fee within thirty (30) days, this action will be
7 dismissed.

8 **IT IS SO ORDERED.**

9 **DATED: June 23, 2014**


10 **Hon. Cynthia Bashant**
11 **United States District Judge**

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